ARREST – Consensual encounter with police is not an arrest or seizure..... ……Revised 1/2010

"Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *United States v. Drayton*, 536 U.S. 194, 200 (2002) [citations omitted].

In *Florida v. Bostick*, 501 U.S. 429 (1991), the United States Supreme Court held that police, without any articulable suspicion, may enter a bus at random and ask passengers for consent to search their luggage. As part of a drug interdiction effort, Florida officers routinely boarded buses at scheduled stops and asked passengers for permission to search their luggage, advising them that they had the right to refuse. Bostick gave his permission and the officers searched his luggage and found cocaine. The question raised was whether the police encounter on the bus constituted a "seizure" within the meaning of the Fourth Amendment. The Court stated, "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Id.* at 434 [citations and internal quotations marks omitted]. The Court reasoned that if the encounter had taken place in the bus station, it would not

have been a seizure, and the fact that Bostick was on the bus did not mean he was "seized" for Fourth Amendment purposes even though the bus was about to leave:

> Here, for example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.

Id. at 436.

The *Bostick* Court concluded that the "appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id*. The defendant argued that his consent was involuntary because no "reasonable person" who was transporting drugs would have agreed to let police search his bags. Noting that a refusal to cooperate, without more, did not furnish grounds for a detention or seizure, the Court said, "the 'reasonable person' test presupposes an innocent person." *Id.* at 438. The Court stressed that its decision applied "equally to police encounters that take place on trains, planes, and city streets." *Id*.

Arizona cases interpreting *Bostick* clarify that officers may question individuals in public places as long as a reasonable person would understand that he could refuse to answer. In *State v. Guillory,* 199 Ariz. 462, 465, ¶¶ 10-11, 18 P.3d 1261, 1264 (App. 2001), the Court of Appeals found that an officer's waving his hand and making eye contact with a passing driver was not a "show of authority," but rather were an attempt to invite a consensual response. In *State v. Wyman*, 197 Ariz. 10, 13-14, ¶ 8, 3 P.3d 392, 395-396 (App. 2000), the Court of Appeals held that an officer's initial request to talk with a group of suspects was "well within the bounds of a consensual encounter,"

noting that the officer asked rather than demanded that they talk with him. The officer neither threatened them nor made any attempt to physically restrain them. However, the officer's continued requests to talk to the group "clearly demonstrated that they were not free to ignore him and go about their business." *Id*.

In *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996), two uniformed police officers were conducting a traffic stop at night in a residential neighborhood when Rogers and another man emerged from behind some large bushes, walked down the middle of the road, and stared at the officers. The officers were concerned and radioed two other officers nearby, asking them to stop the two men and "find out who they were and what they were up to." *Id*. at 509, 924 P.2d at 1028. The other two officers approached the two men, identified themselves, and asked to talk to them; Rogers said something to them and then turned and ran. Police pursued Rogers and later found a bag of crack cocaine along his path. Because Rogers stopped, the Court found, "a reasonable person under the circumstances would not have felt free to disregard the police and go about his business – a conclusion supported by defendant's attempt to leave resulting in his chase and arrest." *Id.* at 511, 924 P.2d at 1030 (1996). The Court held that the officers had performed an illegal investigative *Terry*[1] stop without any specific, articulable suspicion justifying the stop, so ordered that the cocaine must be suppressed. The *Rogers* Court distinguished *California v. Hodari D.,* 499 U.S. 621, 625-26 (1991), in which the United States Supreme Court held that, absent physical force, an individual must yield to a show of authority for a seizure to occur. In *Hodari D.*, no seizure occurred when a defendant ran after seeing an approaching police car. *Id*. at

[1] *Terry v. Ohio*, 392 U.S. 1 (1968)

622-23, 629. However, the Arizona Supreme Court reasoned that, unlike the defendant in *Hodari D.*, Rogers had briefly yielded to police authority because he stopped and spoke to the officers before running, and that this constituted an illegal stop because the officers had no reasonable, articulable suspicion to perform a *Terry* stop.

Compare *Rogers*, with *State v. Watkins*, 207 Ariz. 562, 567, 88 P.3d 1174, 1179 (App. 2004), in which two men burglarized the victim's apartment. She recognized the men as acquaintances of Watkins and went to his home. She found the men there and confronted them; they denied taking her property and one of them choked her. The victim and Watkins called police and the victim went home. When police arrived, she told them what had happened and she and the officers began to walk to Watkins's home. The victim then saw Watkins nearby and identified him to the officers, who asked him to stop, thinking he was either an investigative lead or a suspect. Watkins stopped, but immediately lifted his jacket and moved his hands towards his waist. The officers thought he might have a weapon, so they approached him and asked for consent to pat him down. An officer felt a baggie of drugs in Watkins's clothing and asked Watkins to hand it over. Watkins refused and tried to flee, but they caught him and arrested him for drug offenses. Watkins moved to suppress the drugs. The Court of Appeals upheld the trial court's denial of the motion to suppress, holding that the minimally-intrusive investigative stop of Watkins as a material witness was justified by the public's concern for apprehending known violent criminals. *Id.* at 565, ¶ 14, 88 P.3d, *citing Illinois v. Lidster*, 540 U.S. 419 (2004).